

Missouri Law Review

Volume 81
Issue 4 Fall 2016- Symposium

Article 16

Fall 2016

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Recommended Citation

Jack Downing, *An Important Time for the Future of Class Action Waivers and the Power Struggle Between Businesses and Consumers*, 81 Mo. L. REV. (2016)
Available at: <https://scholarship.law.missouri.edu/mlr/vol81/iss4/16>

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NOTE

An Important Time for the Future of Class Action Waivers and the Power Struggle Between Businesses and Consumers

*Jack Downing**

I. INTRODUCTION

For nearly a century, arbitration in the United States has been used and enforced as a mechanism to facilitate quick and inexpensive resolutions to disputes. Contracts with arbitration clauses allow the signatories to quickly arbitrate disputes from the outset of their agreement. Binding arbitration will result in a decision, to which each of the parties must adhere.¹ Arbitrated disputes, in their purest form, can bring about fair and unbiased decisions not only more quickly, but also at a fraction of the cost of taking the same dispute through the litigation process.²

The Federal Arbitration Act (“FAA” or “Act”) was enacted in 1925 in response to courts’ unfavorable treatment of arbitration agreements.³ Among many provisions protecting the enforceability of such agreements, § 2 of the FAA provides that “an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁴ Over the years, this provision has been the subject of debate in numerous courts throughout the United States, including, on many occasions, the Supreme Court of the United States.⁵

Specifically, this Note examines the modern application of this section of the FAA and how recent developments regarding agreements to arbitrate

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1. *What Is Binding Arbitration?*, LAW DICTIONARY, <http://thelawdictionary.org/binding-arbitration/> (last visited Jan. 11, 2017).

2. See Asa Lopatin, *What Constitutes Arbitration for Federal Arbitration Act Purposes?*, ABA (June 16, 2014), <http://apps.americanbar.org/litigation/committees/adr/articles/spring2014-0614-federal-arbitration-act.html>.

3. See *id.*

4. 9 U.S.C. § 2 (2012).

5. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

have impacted the overall fairness of arbitration proceedings. In the consumer setting, courts have not heavily weighed the bargaining power imbalance that often accompanies these agreements.⁶ Instead, the Supreme Court has sought to protect individuals' rights and their ability to contract freely,⁷ but in doing so, the Court has ignored detrimental public policy implications. Perhaps most notably, the Supreme Court has recently declared that the FAA will preempt any state law finding that class action waiver clauses in contractual agreements are invalid.⁸ Pursuant to these types of clauses, the bargaining parties agree to forego any ability to bring a class action claim arising out of the contract.⁹ This means each claim must be resolved "bilaterally."¹⁰ The implications of such a waiver are extraordinary.

Now has come an important time for the future of class action waivers. Recently, legislation was proposed in Congress to protect consumers from entering into class action waiver agreements unfavorable to them,¹¹ but with a lack of bipartisan support, it may be difficult to enact such legislation. A remedy more likely to protect consumers will come from various regulatory agencies. Many of these agencies have the power to prohibit class action waivers in contracts where one party has superior bargaining power.¹² Agencies such as the Consumer Finance Protection Bureau ("CFPB") have already begun proposing rules that would limit the use of these waivers.¹³

This Note discusses the inherent problems that come with arbitration clauses in contracts of adhesion. Further, this Note will address the likelihood of a potential change – through future Supreme Court interpretations of the FAA or new legislation. Something must be done to protect those with inferior bargaining power from being forced, through contracts of adhesion, to give up their right to bring class action lawsuits. If Congress, the Supreme Court, and regulatory agencies maintain the status quo, companies will retain

6. These contracts in which one party has superior bargaining power are often referred to as contracts of adhesion. Cornell Univ. Law School, *Adhesion Contract (Contract of Adhesion)*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion (last visited Jan. 11, 2017).

7. See generally *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 464–65 (2015).

8. See *id.* at 468.

9. See *Concepcion*, 563 U.S. at 337.

10. See *id.* at 348. In this context, "bilaterally" means that each claimant will bring his or her case individually. See *id.* at 348–50.

11. Restoring Statutory Rights and Interests of the States Act, S. 2506, 114th Cong. (2016).

12. CFPB *Considers Proposal to Ban Arbitration Clauses That Allow Companies to Avoid Accountability to Their Customers*, CONSUMER FIN. PROTECTION BUREAU (Oct. 7, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/> [hereinafter CFPB Press Release].

13. See *id.* See also Arbitration Agreements, 81 Fed. Reg. 32830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

the ability to improperly strip consumers of their rights and their due compensation nationwide.

II. LEGAL BACKGROUND

As mentioned in the Introduction, the FAA was enacted to overcome judicial hostility toward arbitration agreements.¹⁴ On many occasions prior to the FAA's enactment in 1925, courts refused to order specific performance of arbitration agreements.¹⁵ By enacting the FAA, Congress indicated its belief that arbitration was a viable alternative to litigation as a legitimate means of dispute resolution.¹⁶ With the Act, Congress wanted to ensure that arbitration agreements would be enforced like other contracts.¹⁷ In interpreting Congress's intent, the Supreme Court has recognized "the desirability of arbitration as an alternative to the complications of litigation."¹⁸ Additionally, the Court has cited efficiency and expediency as benefits resulting from arbitration proceedings.¹⁹ Section 2, a provision that protects arbitration clauses and puts them on equal ground with other contractual agreements, states:

[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁰

This section is considered a "liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary*."²¹ However, this section, and its application to class action waiver clauses, is a subject of major dispute between the state and federal courts.

14. See generally Lopatin, *supra* note 3.

15. See Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-14 (2012)).

16. See generally 9 U.S.C. § 2.

17. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

18. *Wilko v. Swan*, 346 U.S. 427, 431 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

19. See generally *Scherk*, 417 U.S. 506.

20. 9 U.S.C. § 2.

21. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added).

A. History of Class Arbitration Before Concepcion

Issues regarding class arbitration are relatively new, with the first decision of the Supreme Court of the United States regarding the matter coming in 2003 with *Green Tree Financial Corp. v. Bazzle*.²² There, the Court was presented with the issue of whether the FAA prohibits companies from attaching class arbitration waivers to their contracts.²³ Before deciding that issue, the Supreme Court had to determine the preliminary issue of whether the contract in question forbid class arbitration.²⁴ To this point, the Court held: “The question – whether the agreement forbids class arbitration – is for the arbitrator to decide.”²⁵ The next logical question was what would the Supreme Court decide on appeal when an arbitrator does make a ruling on the issue.²⁶

In 2010, the Supreme Court addressed this question in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*²⁷ In *Stolt-Nielsen*, the panel of arbitrators based its decision on “post-*Bazzle* arbitral decisions” that allowed for class arbitration in a wide variety of settings – in this instance, antitrust.²⁸ The arbitrators believed, since the contract was silent on the issue of class arbitration, there existed “[a]n implicit agreement to authorize class-action arbitration.”²⁹ The Court, however, disagreed, holding that “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”³⁰ It discussed the “consensual” nature of arbitration and found that if the parties did not expressly agree to permit class proceedings, there was no implicit agreement.³¹ In essence, this meant that the default rule, in every contract silent on the issue of class arbitration, was that a party may not bring a class arbitration proceeding – only a bilateral arbitration.³² Following *Stolt-Nielsen*, one question remained: what happens when a contract calls for an express waiver of class arbitration proceedings?

22. 539 U.S. 444 (2003).

23. *Id.* at 451.

24. *Id.* at 450.

25. *Id.* at 451.

26. The court in *Bazzle* did not address this question.

27. 559 U.S. 662, 669–70 (2010).

28. *Id.* at 673.

29. *Id.* at 685.

30. *Id.*

31. *Id.* at 687.

32. *Id.*

B. AT&T Mobility LLC v. Concepcion and the Enforcement of Class Arbitration Waiver Agreements

Regarding express waivers of class arbitration proceedings, the Supreme Court handed down a landmark decision in 2011, *AT&T Mobility LLC v. Concepcion*.³³ The facts of the case are relatively simple: the Concepcions brought the case as a putative class action to recover the amount of the sales tax paid on AT&T phones that had been advertised as free.³⁴ The Court granted certiorari after the Supreme Court of California held that the class arbitration waiver provision was “unconscionable because it disallowed class-wide proceedings.”³⁵ The Supreme Court of California applied its *Discover Bank* rule, which declared a class action waiver provision unconscionable when: (1) the waiver is “found in a consumer contract of adhesion,” (2) the class action would involve a “predictably” small amount of money, and (3) it is alleged that the party with “superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”³⁶

Writing for the majority, Justice Scalia invalidated each of these three elements of the *Discover Bank* rule and dismissed them as non-legitimate requirements to find unconscionability in the contract.³⁷ According to the Supreme Court, “When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”³⁸ Moreover, when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” federal law will preempt it.³⁹ Pursuant to this rule, a five-four Supreme Court majority held that the FAA preempted California’s *Discover Bank* rule.⁴⁰ In support of this conclusion, the Court offered a variety of different reasons for why class arbitration was impractical and contrary to Congress’s intent when creating the FAA.⁴¹

First, the majority determined that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”⁴² The court offered several statistics to

33. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

34. *Id.* at 327 (the sales tax charge to the plaintiff was \$32.22).

35. *Id.* at 333. A contractual provision is unconscionable when it is so unfair that no ordinary, informed person would agree to it. *Unconscionable*, LAW.COM, <http://dictionary.law.com/Default.aspx?selected=2183> (last visited Jan. 11, 2017).

36. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) *abrogated by Concepcion*, 563 U.S. 333.

37. *Concepcion*, 563 U.S. at 351–52.

38. *Id.* at 341 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

39. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

40. *Concepcion*, 563 U.S. at 352.

41. *Id.* at 348–52.

42. *Id.* at 348.

prove this point.⁴³ According to the opinion, the median time from the filing of a class arbitration dispute to its settlement was 583 days – much longer than the median time for bilateral arbitrations.⁴⁴

Second, the majority discussed the notion that class arbitration required “procedural formality.”⁴⁵ The majority pointed out that the American Arbitration Association’s (“AAA”) rules for class certification parallel those of the Federal Rules of Civil Procedure (“FRCP”).⁴⁶ This causes complications, as many arbitrators are not familiar with the rules for class certification and may make determinations based solely on policy.⁴⁷ The majority held: “We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator.”⁴⁸

Third, the majority felt that arbitration, lacking in appellate review, “is poorly suited to the higher stakes of litigation.”⁴⁹ It cited a more favorable appeals process in litigation and less room for error.⁵⁰ Justice Breyer’s dissent⁵¹ hotly contested each of these three points.

First, he believed the majority’s comparison between class and bilateral arbitration to be improper.⁵² He stated, “The *relevant* comparison is not ‘arbitration with arbitration’ but a comparison between class arbitration and judicial class actions.”⁵³ Comparing these two, Justice Breyer found that class arbitrations are faster than judicial class actions,⁵⁴ undermining the underlying public policy argument of the majority. Instead of hindering the expeditiousness of dispute resolution, class arbitration actually acted in furtherance of it, Justice Breyer argued.⁵⁵ Regarding the second point, Justice Breyer contended that the guidelines set forth by the AAA are more than sufficient to allow arbitrators to make a determination regarding the appropriateness of certifying a given class.⁵⁶ Lastly, Justice Breyer pointed out that “the majority provides no convincing reason to believe that parties are unwilling to submit High-Stake disputes to Arbitration” and went on to cite numerous scenarios where the parties did submit “High-Stake” disputes.⁵⁷

43. *Id.* at 348–49.

44. *Id.*

45. *Id.* at 349.

46. *Id.*

47. *See generally* Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662 (2010).

48. *Concepcion*, 563 U.S. at 349.

49. *Id.* at 350.

50. *Id.*

51. *Id.* at 357 (Breyer, J., dissenting) (he was joined by Justices Ginsburg, Sotomayor, and Kagan).

52. *Id.* at 363.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 362.

57. *Id.* at 363.

Ultimately, the majority found that California's *Discover Bank* rule was contrary to the intent of Congress and, therefore, preempted by the FAA.⁵⁸ Although each individual point was disputed by the dissent, there was one main overarching public policy reason for which he dissented: the holding in *Concepcion* shields companies from liability arising from their manipulation of consumer contracts in a way that deliberately cheats consumers out of small amounts of money.⁵⁹ In Justice Breyer's words, *Discover Bank* acknowledges situations where "consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds by 'deliberately cheat[ing] large numbers of consumers out of individually small sums of money,'" and the implementation of a rule prohibiting such conduct should be "California's to make."⁶⁰

Since plaintiffs and attorneys have little incentive to pursue any form of dispute resolution to recover small amounts of money, they will rarely bring individual claims.⁶¹ For this reason, companies have the ability to cheat their customers out of small amounts of money, knowing each of them individually will fail to file a claim subject to arbitration.⁶² When multiplied by millions of customers, these small amounts of money will produce substantial profit for the companies at the expense of consumers.⁶³ The result from *Concepcion* is contrary to sound public policy, and since the decision in 2011, many courts around the country have done all they can to limit its effect.⁶⁴

III. RECENT DEVELOPMENTS

In the post-*Concepcion* world, lawyers and courts alike have been crafting arguments and opinions that allow courts to find class arbitration waivers invalid in spite of the holding in *Concepcion*.⁶⁵ In Missouri, as well as other states, the highest courts have issued opinions that push the limits delineated by *Stolt-Nielsen* and *Concepcion* in order to address the underlying policy considerations.⁶⁶ However, courts can only stretch their decisions so far before having to recognize the binding authority set forth by *Concepcion*. With this in mind, a more effective solution would be to enact legislation prohibit-

58. *Id.* at 352 (majority opinion).

59. *Id.* at 365–66 (Breyer, J., dissenting).

60. *Id.* at 365–66 (alteration in original) (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

61. *Id.* at 347, 351 n.8 (majority opinion).

62. *See generally id.* at 351–52.

63. *Id.* at 365–66 (Breyer, J., dissenting).

64. *See Wallace v. Red Bull Distrib. Co.*, 958 F. Supp. 2d 811, 822 (N.D. Ohio 2013); *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.*, 128 Cal. Rptr. 3d 330, 339 (Cal. Ct. App. 2011).

65. *See Orman v. Citigroup, Inc.*, No. 11 Civ. 7086 DAB, 2012 WL 4039850, at *3 (S.D.N.Y. Sept. 12, 2012).

66. *See Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 492–96 (Mo. 2012) (en banc).

ing the use of class action waivers in contracts of adhesion. Until this happens, courts will continue to find ways to limit the scope of *Concepcion*.

A. Finding a Way Around *Concepcion*

In *Brewer v. Missouri Title Loans*, the Supreme Court of Missouri held that a class arbitration waiver in certain situations is unconscionable and unenforceable.⁶⁷ The court applied *Concepcion* to find “that the presence and enforcement of the class arbitration waiver does not make the arbitration clause unconscionable.”⁶⁸ This was another case involving many individually small damage amounts that, when combined, would amount to a large profit for Missouri Title Loans.⁶⁹ The loan company contended “that all state law unconscionability defenses are preempted by the [FAA] in all cases,” pursuant to the holding in *Concepcion*.⁷⁰ In response to this argument, the Supreme Court of Missouri made several points, creating an avenue around the authoritative holding in *Concepcion*.⁷¹

First, the Supreme Court of Missouri found that “the expressly stated issue in *Concepcion* was whether California’s *Discover Bank* rule was preempted, not whether all state law unconscionability defenses are preempted.”⁷² The court cited the unique criteria laid out in the *Discover Bank* rule and determined that the contract laws of other states are sufficiently different from the *Discover Bank* rule.⁷³ It therefore deduced:

Not all state law contract defenses require class wide arbitration to the detriment of both the defendant and the plaintiff consumer. Accordingly, consistent with the stated issue in *Concepcion*, the Supreme Court’s holding was expressly limited to finding that [the FAA preempts *only* California’s *Discover Bank* rule].⁷⁴

Effectively, the court determined that a case-by-case analysis of the FAA’s preemption over state contract law would be necessary moving forward.⁷⁵

Second, the Supreme Court of Missouri found: “Holding that the § 2 saving clause preempts all state law unconscionability defenses would be inconsistent with both the saving clause and the [Supreme Court] majority’s express recognition of unconscionability as one of the generally applicable

67. *See id.* at 493.

68. *Id.* at 487.

69. *Id.* at 486.

70. *Id.* at 490.

71. *Id.* at 486.

72. *Id.* at 490.

73. *Id.*

74. *Id.*

75. *Id.* at 491.

contract defenses that retains vitality under the § 2 saving clause.”⁷⁶ Again, the court stressed that every case is different and concluded that it was not Congress’s intent to create a federal law that deliberately preempted all state contract law unconscionability defenses.⁷⁷

Lastly, the Supreme Court of Missouri found that because the majority in *Concepcion* engaged in a drawn-out analysis of unconscionability, it could not have possibly intended to hold that the FAA preempts all state law unconscionability defenses *per se*.⁷⁸ In essence, the Supreme Court of Missouri thought the Court in *Concepcion* made a determination based on the facts of the case.⁷⁹ Thus, because state contract laws are different in each state – particularly, the unconscionability defense requirements – and because the facts of each case are different, all cases regarding class arbitration waiver clauses must be examined on a case-by-case basis.⁸⁰

Ultimately, the Supreme Court of Missouri used these points to maneuver around *Concepcion*. After applying Missouri contract law regarding unconscionability, the court held that the class arbitration provision was unconscionable because the arbitration agreement as a whole was unconscionable based on its terms.⁸¹

B. The Supreme Court’s Response to State Efforts to Limit the Scope of Concepcion

In 2015, another California case, *DIRECTV, Inc. v. Imburgia*, analyzed the FAA’s preemption of state laws regarding class arbitration waivers.⁸² The agreement in this case specified that the entire arbitration clause was not enforceable if the “law of your state” declared class arbitration waivers unenforceable.⁸³ Before the case was brought to the Supreme Court of the United States, the Supreme Court of California determined that since parties are free to contract as they wish, and since the contract applied California state law, the contract referred to the existing California law “as it would have been absent federal pre-emption.”⁸⁴ According to this finding, the Supreme Court of California held the class arbitration provision invalid under state law because such a provision was unconscionable.⁸⁵ On appeal, the Supreme Court of the United States granted certiorari.⁸⁶

76. *Id.* at 490.

77. *Id.* at 490–91.

78. *Id.*

79. *Id.* at 492.

80. *Id.* at 490.

81. *Id.* at 496.

82. *See* *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468–69 (2015).

83. *Id.* at 468.

84. *Id.* at 464.

85. *Id.* at 466, 472.

86. *Id.* at 467–68.

In reversing the Supreme Court of California, the Court offered a variety of arguments.⁸⁷ In the majority opinion authored by Justice Breyer, the Court first noted that its decisions were binding on the lower courts.⁸⁸ This served as a scathing reminder to the Supreme Court of California to recognize binding authority. It seemed Justice Breyer recognized that California, and many other state courts, were trying to evade the holding in *Concepcion*. He referred the California court to the Supremacy Clause of the U.S. Constitution: “[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.”⁸⁹

With regard to the state law at issue in *DIRECTV*, the Court held: “Absent any indication in the contract that this language is meant to refer to *invalid* state law, it presumably takes its ordinary meaning: *valid* state law.”⁹⁰ The Court defined valid state law to be state law that is not preempted by federal law, and since the FAA preempts state law with regard to class arbitration waivers, the state law applied in this case was determined to be invalid.⁹¹ Thus, the Supreme Court nullified the efforts of the Supreme Court of California, and, in doing so, thwarted its effort to get around the *Concepcion* holding.⁹²

In the post-*Concepcion* world, many other state courts have struggled to accept the policy outcome of *Concepcion*.⁹³ The *Concepcion* holding created a loophole that allows companies with superior bargaining power to impose small expenses on individuals and exculpate themselves from potential liability through contracts of adhesion.⁹⁴ Traditional state law contract defenses, such as unconscionability, would not work when applied directly to the class arbitration provisions, regardless of the merits of the defense.⁹⁵ The Supreme Court effectively made a preemptive determination that because the FAA preempts state law on arbitration proceedings, class arbitration waivers cannot be held unconscionable *per se* by state courts under state law.⁹⁶

87. *Id.* at 463.

88. *Id.* at 468 (“No one denies that lower courts must follow this Court’s holding in *Concepcion*. The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation.”).

89. *Id.*

90. *Id.* at 469.

91. *Id.*

92. *See generally id.*

93. *See* *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 492–96 (Mo. 2012) (en banc); *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.*, 128 Cal. Rptr. 3d 330, 339 (Cal. Ct. App. 2011).

94. *See* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 358 (Breyer, J., dissenting).

95. *Id.* at 339–41 (majority opinion).

96. *See generally id.*

C. Congressional Efforts to Prohibit Class Action Waivers

Recognizing the difficulty state courts will have in preventing class action waiver agreements after *Concepcion*, members of Congress recently attempted to enact legislation that would prohibit class action waiver clauses in consumer contracts of adhesion.⁹⁷ The Restoring Statutory Rights and Interests of the States Act of 2016 was proposed in order to protect parties with inferior bargaining power in consumer contracts of adhesion.⁹⁸ Section 2 of the bill states:

Recent court decisions, including *AT&T Mobility v. Concepcion*[,] . . . have interpreted the Federal Arbitration Act to broadly preempt rights and remedies established under substantive State and Federal law. *As a result, these decisions have enabled business entities to avoid or nullify legal duties created by congressional enactment, resulting in millions of people in the United States being unable to vindicate their rights in State and Federal courts.*⁹⁹

In an effort to remedy the problem described in the above quote, the bill seeks to amend the FAA, in part, by allowing a finding of unconscionability regarding arbitration agreement provisions in both federal and state court – this would include class arbitration waiver clauses.¹⁰⁰ If enacted, this bill will effectively bar any class arbitration waiver clause determined to be unconscionable, regardless of the rest of the agreement.¹⁰¹ In essence, it would prevent businesses from using class arbitration clauses to escape liability from the improper charging of consumers.¹⁰²

Current, *Concepcion* continues to prevent unconscionability arguments relating to the class arbitration waiver provision itself.¹⁰³ However, due to compelling policy considerations, courts around the country, members of Congress, and regulatory agencies are making efforts to address this issue.¹⁰⁴

IV. DISCUSSION

This Part takes an in-depth look at issues regarding class arbitration restrictions and discusses possible alternative solutions to what is now an evident problem in the area of consumer contracts. Additionally, it looks at the

97. Restoring Statutory Rights and Interests of the States Act, S. 2506, 114th Cong. (2016).

98. *Id.*

99. *Id.* § 2(a)(3) (emphasis added).

100. *Id.* § 3(a)(2).

101. *Id.*

102. *See id.* § 2(b)(2).

103. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

104. *See generally* Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907 (2015).

ways the changing political landscape may impact policymaking on this issue.

A. Federal Preemption over State Contract Law

The central issue regarding class arbitration waivers is one involving contract law – the doctrine of unconscionability.¹⁰⁵ A contractual provision is unconscionable when it is so inequitable that no ordinary, informed person would agree to it.¹⁰⁶ This doctrine is governed by state law – with each state free to determine precisely what is considered unconscionable.¹⁰⁷ However, pursuant to the Supremacy Clause of the U.S. Constitution, when a state law conflicts with a federal law, the federal law preempts the state law.¹⁰⁸ Thus, the issue in the case of a class arbitration waiver is whether its potential unconscionability is consistent with the FAA.¹⁰⁹ To the extent that prohibiting class arbitration waivers through unconscionability is inconsistent with the FAA, federal law will preempt these state proscriptions.¹¹⁰ *Concepcion* addressed this issue of preserving the original intent of the legislature by ensuring that no state law conflicts with the purposes of the FAA.¹¹¹

Specifically, the Supreme Court cited § 2 of the FAA, which states: an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹² This means that if a contract is invalid from the outset, the provisions within the contract are unenforceable.¹¹³ Section 2 of the FAA seeks to protect arbitration provisions as much as other provisions within the contract.¹¹⁴ Therefore, arbitration provisions, as well as any other contract provisions, should be subject to the same restrictions that generally apply under state contract law – this is the precise intent of the FAA.¹¹⁵

With this in mind, California’s *Discover Bank* rule sought to preserve the original intent of Congress but tailored its unconscionability doctrine to apply to instances of class arbitration waivers.¹¹⁶ The only way to do so was to narrowly circumscribe the context in which a class arbitration waiver

105. See *Concepcion*, 563 U.S. at 340.

106. *Unconscionable*, LAW.COM, <http://dictionary.law.com/Default.aspx?selected=2183> (last visited Jan. 11, 2017).

107. *Concepcion*, 563 U.S. at 357 (Breyer, J., dissenting).

108. U.S. CONST. art. VI, cl. 2.

109. *Concepcion*, 563 U.S. at 341.

110. See *id.*

111. *Id.* at 343.

112. 9 U.S.C. § 2 (2012).

113. *Id.*

114. *Id.*; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974).

115. 9 U.S.C. § 2.

116. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109–10 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. 333.

clause would be unconscionable pursuant to California state law.¹¹⁷ Accordingly, the *Discover Bank* opinion articulated the parameters for a finding of unconscionability.¹¹⁸

According to the *Discover Bank* rule, unconscionability will occur (1) when the waiver “is found in a consumer contract of adhesion,” (2) in an instance where “disputes between the contracting parties predictably involve small amounts of damages,” (3) “when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” and (4) when the waiver becomes an exemption of the party’s responsibility for its fraud or willful injury to the person or property of another.¹¹⁹ These rules preserved the intent of the FAA, because they do not weaken the strength of the arbitration provision.¹²⁰ They merely applied a general law of contracts to the unique principle of class arbitration waivers.¹²¹

Further, as Justice Breyer noted in his *Concepcion* dissent, “[I]nsofar as we seek to implement Congress’ intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate upon the same footing.”¹²² This is because there is no language in the *Discover Bank* rule that provides for a different treatment of class arbitration waivers than other class action waivers.¹²³ There is simply no direct violation of the FAA in California’s *Discover Bank* rule. While claiming that it was preserving the original intent of Congress, in reality, the majority in *Concepcion* made a judgment call and inserted its own policy preferences regarding class arbitration waiver clauses.¹²⁴ Ultimately, this issue has significant public policy ramifications, and judicial interpretations of the FAA have inevitably been skewed based on the ideological beliefs underlying each side’s policy preferences.

B. Public Policy Regarding Class Arbitration Waiver Provisions

Concepcion drastically altered the legal landscape of arbitration clauses – particularly in the area of consumer contracts of adhesion.¹²⁵ The decision is considered a favorable ruling for businesses, as it allows them to negotiate with the luxury of knowing they will not be subject to class action litigation

117. *See id.* at 1112.

118. *Id.* at 1109–10.

119. *Id.*

120. *Concepcion*, 563 U.S. at 356 (Breyer, J., dissenting).

121. *See Discover Bank*, 113 P.3d at 1110.

122. *Concepcion*, 563 U.S. at 362 (Breyer, J., dissenting).

123. *Id.*

124. *Id.* at 365.

125. Jonathon L. Serafini, Note, *The Deception of Concepcion: Saving Unconscionability After AT&T Mobility LLC v. Concepcion*, 48 GONZ. L. REV. 187, 188–89 (2012).

as long as they include a class arbitration waiver provision.¹²⁶ Regarding the enforceability of the waivers, compelling policy arguments can be provided for both sides.

1. Arguments for Class Arbitration Waivers

There are several reasons to allow companies to include these waivers in their contracts of adhesion with consumers. One of the most compelling reasons is that individual arbitrators themselves are, in many instances, hardly qualified to make a determination regarding certification of a class of plaintiffs.¹²⁷ Rule 23 of the FRCP guides courts in the creation of a standard federal class action lawsuit.¹²⁸ The plaintiffs must meet multiple requirements for the court to grant certification.¹²⁹ As such, courts have practical knowledge and expertise regarding class certification requirements, and they are more capable of making a sound judgment on the issue than arbitrators – many of whom have non-legal backgrounds.

Although the Supplementary Rules for Class Arbitrations closely mirror those of the FRCP regarding the certification requirements,¹³⁰ individual arbitrators will have little guidance in applying these rules, and they will likely be more inclined to decide certification based on policy judgments rather than the text of the rules.¹³¹ To that effect, arbitrators would run the risk of violating the due process rights of third-party class members through issuing binding decisions regarding class certification, and it is “odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied.”¹³² Sound procedural judgment is important in protecting potential third-party class members and defendants, and a court seems more competent to make complex procedural determinations than arbitrators.

Moreover, in protecting defendants, the informal process of arbitration leaves defendants less of an opportunity for review of errors made when coming to a decision.¹³³ The majority in *Concepcion* states:

Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and pre-

126. Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration*, N.Y. TIMES (Apr. 27, 2011), http://www.nytimes.com/2011/04/28/business/28bizcourt.html?_r=0.

127. *Concepcion*, 563 U.S. at 349; see also Liptak, *supra* note 126.

128. FED. R. CIV. P. 23.

129. *Id.*

130. Compare Am. Arbitration Ass’n, *Supplementary Rules for Class Arbitrations* (2011), https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf, with *id.*

131. *Concepcion*, 563 U.S. at 347–48.

132. *Id.* at 349–50.

133. *Id.* at 350.

sumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.¹³⁴

The majority held that due to the informality and lack of review, “arbitration is poorly suited to the higher stakes of class litigation.”¹³⁵ The burden placed on the defendant by the potential of a class arbitration is cause for concern. However, there are also a multitude of counter arguments against class arbitration waiver provisions.

2. Arguments Against Class Arbitration Waivers

It is true that class arbitration places a burden on the defendant in the sense that it creates potential liability on a much greater scale.¹³⁶ However, class action litigation does this as well.¹³⁷ A defendant should necessarily be exposed to liability for whatever harm it causes – regardless of the scope of that harm. If it is expediency and efficiency that the company issuing the contract of adhesion prefers, then it should include an arbitration provision.¹³⁸ However, if it wants to ensure the most equitable process of review, it should not include such an arbitration provision.¹³⁹ The issuing company must choose between these two options based on its preferences – it should not be able to have it both ways.

In a post-*Concepcion* world, the company issuing an adhesion contract with a class arbitration waiver provision does have it both ways. Not only are consumers forced to arbitrate individually any disputes arising out of the contract, but they are also unable to bring a class action.¹⁴⁰ Effectively, this means consumers’ only option is to arbitrate their claims on an individual basis.¹⁴¹ When only small amounts of money are involved, claimants have no incentive to bring a claim, as it would often be more costly to go through the arbitration process than it would be to simply accept the harm.¹⁴² Thus, “the realistic alternative to a class action is not [millions of] individual suits, but zero individual suits, as only a lunatic or a fanatic sues” for such a small

134. *Id.*

135. *Id.*

136. *Id.*

137. Miriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 386 (2005).

138. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 507 (1974).

139. *Concepcion*, 563 U.S. at 350.

140. *Id.* at 352.

141. *Id.*

142. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (9th Cir. 2009), *rev’d sub nom.* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

amount of money.¹⁴³ With full knowledge of this tendency of consumers, companies are free to tack on as many small fees to their products and services as they want, knowing that the consumers simply will not make a claim, because it is not in their rational best interest to do so.¹⁴⁴

This is the central problem with allowing companies with superior bargaining power to impose class arbitration waiver clauses in contracts of adhesion. There is no way to hold companies accountable without an appropriate and effective means to remedy individually small, but collectively large, amounts of consumer harm.¹⁴⁵ A contractual provision with such a ramification is unconscionable.¹⁴⁶

C. Missouri and California Attempt to Protect Parties with Weaker Bargaining Power

As mentioned previously, Missouri's response to *Concepcion* came with the Supreme Court of Missouri's holding in *Brewer*.¹⁴⁷ The court offered a variety of distinguishing characteristics between the facts in *Brewer* and *Concepcion*.¹⁴⁸ The Supreme Court of Missouri concluded that since its unconscionability laws were different from California's, it was free to make a determination regarding the validity of the contract as a whole – including its class arbitration waiver provision – and whether it was unconscionable.¹⁴⁹ Thus, while the Supreme Court of Missouri is still bound by the *Concepcion* holding, it will only be bound to a finding of contractual validity in instances similar to *Concepcion*.

However, facts similar to those in *Concepcion* are becoming increasingly prevalent, and courts in Missouri are having a difficult time distinguishing each case from *Concepcion*.¹⁵⁰ In light of the *Brewer* holding, the plaintiff in *Davis v. Sprint Nextel Corp.* sought to bring a class action claim against Sprint after being charged improper late fees.¹⁵¹ The contract included a class action waiver provision.¹⁵² In this case, the court held that the facts were not sufficiently different from *Concepcion* to find the contract unconscionable.¹⁵³ In reaching its decision, the court recognized *Brewer* but conceded that its

143. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

144. *See id.*

145. *Concepcion*, 563 U.S. at 365–66 (Breyer, J., dissenting).

146. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109–10 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. 333.

147. *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. 2012) (en banc).

148. *See id.* at 492–96.

149. *Id.* at 496.

150. *Davis v. Sprint Nextel Corp.*, No. 12-01023-CV-W-DW, 2012 WL 5904327, at *5 (W.D. Mo. Nov. 26, 2012).

151. *Id.* at *1.

152. *Id.*

153. *Id.* at *5.

application was limited to contracts that were unconscionable as a whole.¹⁵⁴ The court was unable to find general unconscionability in the contract and was therefore bound by the holding in *Concepcion*.¹⁵⁵

Thus, while Missouri has made efforts to protect the consumer through findings of contractual unconscionability, the scope of the protection is limited. *Concepcion*'s application has proven broad – precluding any unconscionability defense regarding the class arbitration waiver provision itself.¹⁵⁶

The *DIRECTV* case was another example of the Supreme Court of California's strong effort to protect consumers by preventing companies with superior bargaining power from taking advantage of contractual loopholes.¹⁵⁷ When the arbitration agreement provided that the entire arbitration clause was not enforceable if the "law of your state" declared class arbitration waivers unenforceable, the Supreme Court of California held that ambiguities with phraseology should be construed against the drafter, not the consumer.¹⁵⁸ However, the Supreme Court of the United States dismissed this notion and simply held that "the law of your state" means valid state law not preempted by federal law.¹⁵⁹ On this most recent occasion, and many others preceding it, the Supreme Court continues to hand down favorable rulings for powerful companies with superior bargaining power that issue contracts of adhesion.¹⁶⁰ As time passes, more and more companies are using these waivers to escape the just consequences of charging customers improper fees.¹⁶¹ Fortunately, as more people realize what is happening with these waivers in practice, there is growing pressure for change.

D. Potential Legislation and the Future of Class Arbitration Waiver Clauses

Many governmental agencies have protested the use of class arbitration waiver clauses, as well as arbitration clauses in general.¹⁶² The Director of the CFPB, Richard Cordray, stated in a recent speech: "Companies should not be able to place themselves above the law and evade public accountability simply by inserting the magic word 'arbitration' in a document and dictating

154. *Id.* at *3.

155. *Id.* at *5.

156. *See* AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 339 (2011).

157. *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 195 (Cal. 2014), *rev'd*, 136 S. Ct. 463 (2015).

158. *Id.* at 196.

159. *Imburgia*, 136 S. Ct. at 468.

160. *Id.* at 463.

161. *See id.* at 477; *see also Concepcion*, 563 U.S. at 339; *Davis v. Sprint Nextel Corp.*, No. 12-01023-CV-W-DW, 2012 WL 5904327, at *3 (W.D. Mo. Nov. 26, 2012).

162. David Lazarus, *Government May Soon Begin Putting an End to Forced Arbitration Clauses*, L.A. TIMES (Feb. 26, 2016), <http://www.latimes.com/business/la-fi-lazarus-20160226-column.html>.

the favorable consequences.”¹⁶³ He continued, “Consumers should be able to join together to assert and vindicate their established legal rights.”¹⁶⁴ Cordray’s thoughts seem to mirror those of some in Congress, as indicated by recent legislative action regarding arbitration clauses, as there has been recent proposed legislation regarding arbitration.¹⁶⁵

While it is unlikely that Congress would entertain arbitration agreement reform legislation any time soon,¹⁶⁶ it may consider the recently proposed bill, which “would forbid companies from making customers waive their right to sue or join a class-action lawsuit.”¹⁶⁷ Vermont Senator Patrick Leahy, speaking in favor of the bill, said, “[A]rbitration should not be forced upon consumers and workers through take-it-or-leave-it contracts they have no real choice but to accept.”¹⁶⁸ A contract requiring a waiver of the ability to bring a class action is contrary to sound public policy.¹⁶⁹

Not surprisingly, this issue is very polarizing and creates a pronounced split across ideological lines.¹⁷⁰ The likelihood of reaching a solution via the Supreme Court or Congress depends greatly on the ideological balance of these institutions.¹⁷¹ Over the past several years, conservative majorities in both the Supreme Court and Congress have been hesitant to prohibit class action waivers for reasons outlined by the majority in *Concepcion* regarding the right to contract freely.¹⁷² In Congress, all parties should agree that companies engaging in illegal activity to cheat consumers out of amounts totaling billions of dollars is intolerable. Members of Congress will likely need to reach across party lines and work together to come up with a solution.

E. Potential Regulatory Agency Action

If the Supreme Court and Congress do not solve the inherent problems arising from class action waivers in contracts of adhesion, regulatory agencies such as the CFPB may intercede.¹⁷³ In May of 2016, the CFPB proposed a

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.* Over the last several years, Congress has been “business friendly” and reluctant to enact legislation that is favorable to the consumer and contrary to the interests of businesses. *Id.*

167. Restoring Statutory Rights and Interests of the States Act, S. 2506, 114th Cong. (2016); Lazarus, *supra* note 162.

168. Lazarus, *supra* note 162.

169. *Id.*

170. *Id.*

171. *Id.*

172. *See* AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 346–47 (2011).

173. CFPB Press Release, *supra* note 12; *see also* George Calhoun, *Arbitration Under Fire: Brace Your Company for Less Contract Freedom and More Class Actions*, FTC BEAT (Mar. 31, 2016), <http://ftcbeat.com/2016/03/31/arbitration-under-fire-brace-your-company-for-less-contract-freedom-and-more-class-actions/>.

rule that would prohibit consumer financial companies from including arbitration clauses to prevent consumers from suing in large numbers.¹⁷⁴ In explaining the reasoning behind the proposal, Richard Cordray stated:

Signing up for a credit card or opening a bank account can often mean signing away your right to take the company to court if things go wrong Many banks and financial companies avoid accountability by putting arbitration clauses in their contracts that block groups of their customers from suing them. Our proposal seeks comment on whether to ban this contract gotcha that effectively denies groups of consumers the right to seek justice and relief for wrongdoing.¹⁷⁵

To support the idea of creating rules protecting consumers from class action waiver clauses, the CFPB conducted a study.¹⁷⁶ According to the results of the study, three quarters of consumers surveyed in the credit card industry did not realize they were subject to arbitration pursuant to the terms of their agreements.¹⁷⁷ Fewer than 7 percent of consumers in the credit card industry understood that their contracts limited their ability to sue in court – including their ability to join in a class action lawsuit.¹⁷⁸ In a previous survey of consumers from a variety of industries, only 2 percent said they would hire an attorney and pursue a claim for small-dollar amounts.¹⁷⁹ This confirms the notion that most consumers simply will not bring an individual claim for a small amount of damages – effectively allowing companies to use class action waivers to escape liability for wrongdoing.¹⁸⁰

With the understanding that legislation is unlikely to bring an end to this problem, the CFPB is actively discussing creating a set of rules that would ban the use of class action waivers in consumer contracts of adhesion.¹⁸¹ Given the current political climate, the best chance for eliminating this problem would be through rules created by regulatory agencies such as the CFPB.¹⁸² Specifically, a rule that would prohibit a company's use of class action waivers in consumer contracts of adhesion would solve the problem.¹⁸³ Of course, these regulations would be subject to challenges and modifications

174. CFPB Press Release, *supra* note 12.

175. *Id.*

176. CFPB, REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) (Mar. 2015) [hereinafter CFPB REPORT], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf; CFPB Press Release, *supra* note 12.

177. CFPB REPORT, *supra* note 176, § 3 p.22; *see also* CFPB Press Release, *supra* note 12.

178. CFPB REPORT, *supra* note 176, § 3 p.19.

179. CFPB Press Release, *supra* note 12.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

through judicial decision-making and legislation, but given the deference usually afforded to regulatory agencies, such challenges would be unlikely to have much material impact.¹⁸⁴

V. CONCLUSION

As is often the case when issuing decisions, courts must consider the policy implications of their rulings. For matters involving class arbitration waiver agreements in contracts of adhesion, the Supreme Court of the United States has adopted a broad interpretation of § 2 of the FAA.¹⁸⁵ As such, it has held that the FAA will preempt any finding of unconscionability relating solely to the class arbitration waiver provision pursuant to state contract law.¹⁸⁶ This holding allows companies with superior bargaining power to impose individually small fees at will, with the knowledge that consumers will choose not to pursue a claim for such a small amount.¹⁸⁷

In an effort to avoid this problem, Missouri courts, as well as courts around the country, have attempted to find ways around the *Concepcion* holding.¹⁸⁸ For the most part, these efforts have been ineffective, and even those that have been successful have had a narrow application.¹⁸⁹ Until the Supreme Court chooses to address this problem, courts will be stuck issuing unfavorable judgments toward consumers, and companies will continue to not be held responsible for the millions of dollars of damages they cause through the accumulation of small fees. If the Supreme Court continues to interpret the FAA in such a broad, preemptive manner and fails to address the policy considerations, legislation may bring about reform by preventing the contracting party from including a class action waiver clause in a contract of adhesion.¹⁹⁰ This would allow courts to preserve Congress's original intent in creating the FAA while preventing this problem. The probability of such legislation becoming law depends on the willingness of Congress to work together in a bipartisan manner to solve this problem.

If Congress and the Supreme Court fail to bring about change that would prevent consumer financial companies from escaping liability through consumer contracts of adhesion that include class action waiver clauses, regulatory agencies such as the CFPB should promulgate regulations that will prohibit the use of such class action waivers.¹⁹¹ In fact, the CFPB has already proposed a rule to eliminate class action waivers.¹⁹² Regulatory action is the

184. Calhoun, *supra* note 173.

185. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–40 (2011).

186. *Id.* at 352.

187. CFPB Press Release, *supra* note 12.

188. *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 487 (Mo. 2012) (en banc).

189. See *id.* at 495.

190. Lazarus, *supra* note 162.

191. CFPB Press Release, *supra* note 12.

192. *Id.*

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most practical and feasible solution to this problem given the partisan nature of the issue and the ideological balance of both the Supreme Court and Congress.

Regardless of how the solution is reached, something must be done to remedy this problem. At the moment, consumers are left with no practical recourse, while companies charge fee after fee, in breach of their contracts, with no fear of being held accountable.¹⁹³ As it stands now, not only are companies wrongly gaining billions of dollars at the expense of the general public, but effectively, consumers are also stripped of their ability to seek redress for their injuries.

193. *Id.*

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